

2002

Terry Smedley and COUNTRYBROOK L.L.C., a  
Utah limited liability company, Cross-Appellants  
and Plaintiffs/Appellees vs. Lynn A. Jenkins, I.,  
Defendant and Appellant : Brief of Appellee

Utah Court of Appeals

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### Recommended Citation

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**IN THE UTAH COURT OF APPEALS**

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Cross-Appellants and  
Plaintiffs/Appellees

vs.

LYNN A. JENKINS, I.,

Defendant and Appellant.

Appeal No. 20020336 - CA  
District Court Case No. 000900778

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**BRIEF OF THE APPELLEES AND CROSS-APPELLANTS**

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Appeal from the Findings of Fact, Conclusions of Law and Order of  
The Second Judicial District Court, Weber County, Utah  
The Honorable Stanton M. Taylor, Presiding

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## **PARTIES**

The appellant and cross-appellee is defendant Lynn A. Jenkins I (“Jenkins”). The appellees and cross-appellants are plaintiffs Terry Smedley (“Smedley”) and Countrybrook, L.L.C. (“Countrybrook”) (collectively “Plaintiffs”).

## **STATEMENT OF JURISDICTION**

Pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2002), the Utah Court of Appeals has jurisdiction of this appeal from the trial court’s Judgment dated April 8, 2002 and entered April 11, 2002. (R. at 682–84).

## **ISSUES PRESENTED FOR REVIEW**

Plaintiffs offer the following statement of issues in lieu of that contained on pages 1 through 3 of Jenkins’ Opening Brief (“Jenkins Brief”). This formulation of the issues more accurately captures the arguments presented to the trial court and the bases for the trial court’s decision below.<sup>1</sup>

**ISSUE NO. 1:** Whether the trial court’s finding of fact that the Notice of Real and/or Personal Property Interests recorded by Jenkins in Weber County, Utah on September 13, 1999 (“Notice of Interest”) was not (a) signed by or authorized pursuant to

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<sup>1</sup> As a preliminary matter, Jenkins’ opening brief is untimely. On December 2, 2002, this Court set the briefing schedule for this appeal. This Court instructed Jenkins to serve and file his brief on or before January 14, 2003. On January 13, 2003, Jenkins moved this Court for an extension of time to file his brief. Pursuant to an Order dated January 15, 2003, this Court granted Jenkins an extension until February 13, 2003 to file his brief. Despite this extension, however, Jenkins did not file his brief until February 21, 2003. Accordingly, this Court may dismiss Jenkins’ appeal on this basis. See Utah R. App. P. 26 (c) (Failure to file timely brief may result in dismissal of the appeal).

a document signed by the owner of the real property; (b) expressly authorized by a state or federal statute; or (c) authorized by or contained in an order or judgment of a court of competent jurisdiction in this state was clearly erroneous?

Findings of fact, whether based on oral or documentary evidence, may not be set aside unless they are clearly erroneous. See Lefavi v. Bertoch, 994 P.2d 817, 821 ¶ 16 (Utah Ct. App. 2000) (citing Utah R. Civ. P. 52(a)). The trial court's findings are clearly erroneous only if the ruling "contradicts the great weight of evidence or if [the] court reviewing the evidence is left with 'a definite and firm conviction that a mistake has been made.'" Sevy v. Security Title Co. of So. Utah, 902 P.2d 629, 635 (Utah 1995) (quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987)).

To mount a successful challenge to the trial court's findings of fact on appeal, Jenkins must "'marshal all the evidence in support of the trial court's findings and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the findings.'" Tanner v. Carter, 20 P.3d 332, 336 ¶ 17 (Utah 2001) (quoting Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985)). This means that Jenkins "must play the devil's advocate" and "extricate [himself] from [his] shoes and fully assume the adversary's position. . . . [He] must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings that [Jenkins] resists." Oneida/SLIC v. Oneida Cold Storage & Warehouse, Inc., 872 P.2d 1051, 1053 (Utah Ct. App. 1994) (internal citations omitted) (emphasis in original). Once Jenkins has "established every pillar supporting [Plaintiffs'] position, [he] then 'must ferret out a fatal flaw in the evidence' and show

why those pillars fail to support the trial court’s findings.” Id. (quoting West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991)). If Jenkins fails to so marshal the evidence, this Court “need not consider the challenge to the sufficiency of the findings.” Tanner, 20 P.3d at 336 ¶ 17.

**ISSUE NO. 2:** Whether the trial court’s finding of fact that the twenty additional documents, including letters from attorneys, stipulations, orders, a title commitment, a certificate of limited partnership and certificates of authority, which were recorded on the real property by Jenkins in Weber County, Utah on July 31, 2000 (“Recorded Documents”) were not (a) signed by or authorized pursuant to a document signed by the owner of the real property; (b) expressly authorized by a state or federal statute; or (c) authorized by or contained in an order or judgment of a court of competent jurisdiction in this state was clearly erroneous?

As stated above, to challenge the trial court’s findings of fact, Jenkins must marshal the evidence. See id. If he fails to do so, his challenge is “nothing more than an attempt to reargue the case” and this Court must ““assume[] that the record supports the findings of the trial court and proceed[] to a review of the accuracy of the lower court’s conclusions of law and the application of that law in the case.” See Campbell v. Box Elder County, 962 P.2d 806, 808 (Utah Ct. App. 1998) (quoting Heber City Corp. v. Simpson, 942 P.2d 307, 312 (Utah 1997)).

**ISSUE NO. 3:** Whether the trial court’s conclusion of the law that the Notice of Interest was a wrongful lien under Utah Code Ann. § 38-9-1 through 38-9-7 was correct?

Conclusions of law are reviewed on appeal for correctness and are accorded no deference. Salt Lake County v. Western Dairymen Co-op., 48 P.3d 910, 914 ¶ 16 (Utah 2002); Salt Lake City v. Silver Fork Pipeline Corp., 5 P.3d 1206, 1212 ¶ 18 (Utah 2000); State v. Comer, 51 P.3d 55, 61 ¶ 12 (Utah Ct. App. 2002).

**ISSUE NO. 4:** Whether the trial court's conclusion of law that the Recorded Documents were wrongful liens under Utah Code Ann. § 38-9-1 through 38-9-7 was correct?

As set forth above, conclusions of law are reviewed for correctness. Western Dairymen, 48 P.3d at 914 ¶ 16; Silver Fork, 5 P.3d at 1212 ¶ 18; Comer, 51 P.3d at 61 ¶ 12.

**ISSUE NO. 5:** Whether the trial court's conclusion of law that Plaintiffs were entitled to the \$30,000 in escrow pursuant to Jenkins' Partial Release of Notice of Interest was correct?

Conclusions of law are reviewed for correctness. Western Dairymen, 48 P.3d at 914 ¶ 16; Silver Fork, 5 P.3d at 1212 ¶ 18; Comer, 51 P.3d at 61 ¶ 12.

**ISSUE NO. 6:** Whether the trial court's conclusion of law that Jenkins was liable to Plaintiffs for damages and reasonable attorneys' fees and costs under Utah Code Ann. § 38-9-4 was correct?

The issue of whether attorneys' fees are recoverable in an action is a question of law that this Court reviews for correctness. Softsolutions v. Brigham Young Univ., 1 P.3d 1095, 1099 ¶ 12 (Utah 2000) (quoting Valcarce v. Fitzgerald, 961 P.2d 305, 315 (Utah 1998)); Warner v. DMG Color, Inc., 20 P.3d 868, 874 ¶ 21 (Utah Ct. App. 2001).

Matters of statutory construction are also questions of law that this Court reviews for correctness. A.K.& R. Whipple Plumbing & Heating v. Guy, 47 P.3d 92, 94 ¶ 7 (Utah Ct. App. 2002) (citing Platts v. Parents Helping Parents, 947 P.2d 658, 661 (Utah 1997)).

**ISSUE NO. 7:** Whether the trial court’s finding of fact that Plaintiffs’ attorneys’ fees and costs were reasonable was clearly erroneous?

The calculation of reasonable attorneys’ fees and costs is in the sound discretion of the trial court and will not be overturned in the absence of a showing of a clear abuse of discretion. Cafferty v. Hughes, 46 P.3d 233, 238 ¶ 26 (Utah Ct. App. 2002); Schafir v. Harrigan, 879 P.2d 1384, 1394 (Utah Ct. App. 1994) (citing Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988)). Thus, in decisions dealing with fee awards, “appellate deference is owed to the trial judge who actually presided over the proceeding and has first-hand familiarity with the litigation.” Whipple Plumbing, 47 P.3d at 94 ¶ 8 (citing Bracken, 764 P.2d at 988 and Utah Dep’t of Soc. Servs. v. Adams, 806 P.2d 1193 (Utah Ct. App. 1991)).

**ISSUE NO. 8:** Whether the trial court’s finding of fact that Plaintiffs incurred \$13,550.00 in actual damages was clearly erroneous?

As set forth above, findings of fact, whether based on oral or documentary evidence, may not be set aside unless they are clearly erroneous. Lefavi, 994 P.2d at 821 ¶ 16. To challenge the trial court’s finding of fact, Jenkins must marshal the evidence. Tanner, 20 P.3d at 336 ¶ 17.

**ISSUE NO. 9:** Whether the trial court’s refusal to treble the damages awarded to Plaintiffs pursuant to Utah Code Ann. § 38-9-4(2) was correct?

This issue calls for statutory interpretation and “thus presents a question of law which [is] review[ed] for correctness, giving no deference to the trial court’s legal conclusions.” Russell v. Thomas, 999 P.2d 1244, 1246 ¶ 8 (Utah Ct. App. 2000).

This issue was preserved below with Plaintiffs’ Supplemental Memorandum in Support of Plaintiffs’ Motion for Order Awarding Damages, Attorneys’ Fees and Costs (R. at 344–59) and Plaintiffs’ Response to Defendant’s Objections to Plaintiffs’ Proposed Findings of Fact, Conclusions of Law, Order and Judgment. (R. at 664–71).

## **STATEMENT OF THE CASE, PROCEEDINGS AND FACTS**

### **NATURE OF THE CASE**

This action arises under the Utah Wrongful Lien Act, Utah Code Ann. § 38-9-1 through 38-9-7 (“Utah Wrongful Lien Act”). Smedley was the owner of certain real property located in Weber County, Utah (“Property”). (R. at 295). Through a series of conveyances in December 1997 and June 1999, Smedley conveyed a portion of the Property to the City of Roy (“Roy Parcel”) and a portion of the Property to Country West Construction & Real Estate, Inc. (“Country West Parcel”) pursuant to Warranty Deeds. (R. at 295–96). Plaintiffs retained fee title to the remainder of the Property (“Countrybrook Parcel”). (R. at 296).

On September 13, 1999, Jenkins recorded the Notice of Interest in Weber County, Utah on all of the Property. (R. at 296). Plaintiffs immediately initiated proceedings under the Utah Wrongful Lien Act by sending a written demand to Jenkins to remove the Notice of Interest. (R. at 296). Although Jenkins agreed to release the Notice of Interest from the Country West Parcel, Jenkins refused to release the Notice of Interest from the

Roy Parcel or the Countrybrook Parcel. (R. at 296). Consequently, Plaintiffs were forced to file a petition under the Utah Wrongful Lien Act for removal of the Notice of Interest. (R. at 1–30). After Plaintiffs filed the petition, Jenkins also recorded the Recorded Documents on the Roy Parcel and the Countrybrook Parcel. (R. at 297).

Despite the expedited proceedings provided for in the Utah Wrongful Lien Act, it took over one year for Plaintiffs to obtain a release of the Notice of Interest and the Recorded Documents and over two years to obtain a final Judgment because of numerous meritless pleadings filed by Jenkins. (R. at 294–99; 675–84). These pleadings, which unnecessarily delayed the proceedings and increased Plaintiffs’ attorneys’ fees, required four separate hearings with the trial court. (R. at 149; 245; 602; 674). During all of this time, Plaintiffs were prevented from using or developing the Countrybrook Parcel. (R. at 351–54). At the conclusion of these proceedings, the trial court entered Judgment in favor of Plaintiffs. (R. at 682–84). This appeal followed. (R. at 686–87).

### **PROCEDURAL HISTORY**

This cross appeal is from the Judgment dated April 8, 2002 and entered on April 11, 2002. (R. at 682–84). This Judgment is the result of the Findings of Fact, Conclusions of Law and Order entered on April 8, 2002, whereby the trial court granted Plaintiffs’ Motion for Order Awarding Damages, Attorneys’ Fees and Costs (R. at 294–99), and the Findings of Fact, Conclusions of Law and Order dated November 28, 2000 and entered on November 30, 2000, whereby the trial court granted Plaintiffs’ Petition to Nullify Wrongful Liens and Releasing Liens from the Property (R. at 675–84).

Jenkins filed a Notice of Appeal on April 22, 2002. (R. at 686–87). On May 10, 2002, Plaintiffs filed a Notice of Cross Appeal on that portion of the Judgment relating to the trial court’s refusal to treble Plaintiffs’ damages. (R. at 708–09).

### **STATEMENT OF FACTS**

In contrast to Jenkins’ Statement of Case (Jenkins Brief at 3–7), which, among things, omits certain important facts, mischaracterizes other facts and alleges facts that are either not relevant to the issues before the Court or contain factual conclusions or legal conclusions not supported by the record, Plaintiffs offer the following Statement of Facts:<sup>2</sup>

1. Smedley was the fee simple owner of the Property, which consisted of approximately 4.93 acres of undeveloped real property in Weber County, Utah. (R. at 295). The Property was to be developed into a residential subdivision in two phases that were referred to as Phase 9 and Phase 10. (R. at 351–54).

2. On July 20, 1999, Plaintiffs conveyed the Country West Parcel to Country West Construction & Real Estate, Inc. (“Country West”). Plaintiffs retained fee title to the Countrybrook Parcel. (R. at 296).

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<sup>2</sup> Jenkins’ opening brief fails to comply with Rule 24(e) of the Utah Rules of Appellate Procedure because it fails to cite to the record. Consequently, this Court should assume the correctness of the Judgment below with respect to the issues appealed by Jenkins. See Fackrell v. Fackrell, 740 P.2d 1318, 1319 (Utah 1987) (If a party fails to make a concise statement of the facts and citation to the pages in the record where those facts are supported, the Court will assume the correctness of the judgment below); Uckerman v. Lincoln Nat’l Life Ins. Co., 588 P.2d 142, 144 (Utah 1978) (“This Court need not, and will not, consider any facts not properly cited to, or supported by, the record”).



3. On or about September 13, 1999, Jenkins recorded the Notice of Interest. (R. at 296). At this time, Plaintiffs had substantially completed development of Phase 9 of the Property. Plaintiffs were in the process of obtaining financing for development of Phase 10 of the Property. (R. at 351–54).

4. On September 24, 1999, Plaintiffs gave Jenkins written notice that the Notice of Interest was a wrongful lien on the Property. Jenkins did not remove the Notice of Interest within twenty (20) days of the written notice. (R. at 296).

5. On November 23, 1999, Jenkins executed a Partial Release of Notice of Interest and Quit Claim Deed releasing the Notice of Interest from the Country West Parcel in exchange for Plaintiffs' placement of \$30,000 in an escrow account with Bonneville Title Company, Inc., which served as substitute property for the Country West Parcel. (R. at 296).

6. On January 31, 2000, Plaintiffs filed their Complaint. The Complaint sought an Order (a) setting aside the Notice of Interest, (b) awarding the \$30,000 in escrow to Plaintiffs, (c) awarding damages and attorneys' fees and costs to Plaintiffs, and (d) restraining Jenkins from filing any liens or other encumbrances on the Property. (R. at 1–30).

7. On February 22, 2000, Jenkins filed a Motion to Dismiss on the grounds that Plaintiffs failed to join an indispensable party. (R. at 34–111). On April 17, 2002, the trial court held a hearing on Jenkins' Motion to Dismiss, which the trial court denied. (R. at 149).

8. On May 11, 2000, Plaintiffs filed a Motion for Hearing on Petition to Nullify Wrongful Lien pursuant to the Utah Wrongful Lien Act. (R. at 150–51). Plaintiffs’ Motion asserted that the Notice of Interest was a wrongful lien under the Utah Wrongful Lien Act because it was not (a) signed by or authorized pursuant to a document signed by the owner of the Property, (b) expressly authorized by a state or federal statute, or (c) authorized by or contained in an order or judgment of a court of competent jurisdiction in this state. (R. at 152–97).

9. On May 22, 2000, Jenkins filed a Motion for Extension of Time to File Counterclaim and Third Party Complaint. (R. at 202–04). Plaintiffs did not oppose the Motion. On August 4, 2000, the trial court issued a memorandum decision granting Jenkins until August 24, 2000 to file his Counterclaim and Third Party Complaint. (R. at 229–30). Jenkins failed to file his Counterclaim and Third Party Complaint by August 24, 2000.

10. On July 31, 2000, Jenkins recorded the Recorded Documents on the Property, which consisted of letters from attorneys, stipulations, orders, a title commitment, a certificate of limited partnership and certificates of authority. (R. at 297).

11. On September 20, 2000, Plaintiffs filed a Supplemental Petition to Nullify Wrongful Lien, which asserted that the Recorded Documents were also wrongful liens under the Utah Wrongful Lien Act. (R. at 237–44).

12. Jenkins did not file an opposition to Plaintiffs’ Motion and Supplemental Petition. Instead, Jenkins filed an Answer that claimed he “would allege he meets all three requirements” for a valid lien under the Utah Wrongful Lien Act. The Answer also

claimed that the \$30,000 placed in escrow was to be “compensation to Jenkins as partial consideration for his Partial Release” of the Country West Parcel. (R. at 205–19).

13. On October 2, 2000, the trial court held a hearing on Plaintiffs’ Motion and Supplemental Petition. (R. at 245). On November 30, 2000, the trial court entered its Findings of Fact, Conclusions of Law and Order. (R. at 294–99). The trial court found that the Notice of Interest and Recorded Documents were wrongful liens under the Utah Wrongful Lien Act. The trial court further found that Plaintiffs were entitled to the \$30,000 in escrow. Finally, the trial court found that Jenkins was liable to Plaintiffs for damages and reasonable attorneys’ fees and costs but reserved the amount of such damages, attorneys’ fees and costs for future determination. (R. at 294–99).

14. On June 19, 2001, Plaintiffs filed a Motion for Order Awarding Damages, Attorneys’ Fees and Costs. The Motion claimed that Plaintiffs were entitled to treble damages and reasonable attorneys’ fees and costs. The Motion was supported by the Affidavit of Laura S. Scott and the Affidavit of T. Richard Davis, both counsel for Plaintiffs. (R. at 302–32). On July 13, 2001, Plaintiffs filed a Supplemental Memorandum supported by the Affidavit of Terry Smedley. (R. at 344–59).

15. In his Affidavit, Smedley testified that during the approximately one year it took to obtain the Order releasing the Notice of Interest and the Recorded Documents from the Property, the price for oil, asphalt, PVC pipe, and other oil-related products increased substantially, resulting in an increase in the cost of improvements to Phase 10 of the Property by \$13,550.00. (R. at 354).

16. Smedley further testified that at the time Jenkins recorded his wrongful liens, Plaintiffs had completed most of the improvements for Phase 9 of the Property, which was sold to E. Gregory Higley (“Mr. Higley”) dba Country West Construction and Real Estate, Inc. (“Country West”) pursuant to a written agreement (“Phase 9 Agreement”). As a result of the wrongful liens recorded by Jenkins, however, Mr. Higley did not pay Plaintiffs the final \$30,000 payment due under the Phase 9 Agreement. Instead, Plaintiffs agreed that this payment would be deposited in escrow pending a determination by the court that the Notice of Interest was a wrongful lien. (R. at 351–54).

17. Finally, Smedley testified that Plaintiffs did not receive any “benefit” from the delay caused by the wrongful liens recorded by Jenkins because Mr. Higley was only obligated to buy the lots for \$30,400 per lot under the Phase 9 Agreement. (R. at 351–54).

18. On September 10, 2001, the trial court held a hearing on Plaintiffs’ Motion. At the hearing, Jenkins argued that the fair market value of the Property increased from September 1999 to December 2000 and that such increase should be an “offset” to any damages awarded to Plaintiffs. Jenkins also alleged that there were inconsistencies in the Plaintiffs’ documents regarding the costs of improvements. (R. at 602).

19. In response, Plaintiffs established that although the fair market value of the lots in Phase 10 may have increased during the period from September 1999 to December 2000, Plaintiffs were not able to take advantage of any increase in fair market value because they were contractually obligated to sell the lots in Phase 10 to Mr. Higley for a

set price pursuant to an agreement negotiated in September 1999 (“Phase 10 Agreement”). (R. at 602).

20. At the conclusion of the hearing, the trial court requested that the parties submit supplemental affidavits regarding this issue. (R. at 602).

21. On December 11, 2001, Plaintiffs filed the Supplemental Affidavit of Terry Smedley. In his Supplemental Affidavit, Smedley testified that in early September 1999, Mr. Higley and Smedley negotiated the Phase 10 Agreement for the purchase of the 15 lots in Phase 10 of the Property. The Phase 10 Agreement stated that the purchase price for the 15 lots in Phase 10 was \$33,000 per lot for a total purchase price of \$495,000. The Phase 10 Agreement was signed by both Mr. Higley and Smedley prior to September 21, 1999. It was amended on or about January 2, 2001 but the purchase price did not change. (R. at 603–40).

22. Smedley further testified that although the fair market value of the lots in Phase 10 may have increased during the period from September 1999 to December 2000, Plaintiffs were not able to take advantage of any increase in fair market value because Plaintiffs were contractually obligated to sell the lots in Phase 10 to Mr. Higley for \$495,000, or \$33,000 per lot, pursuant to the Phase 10 Agreement. (R. at 603–40).

23. Smedley further testified that the alleged “inconsistency” with respect to the costs of improvements was just an attempt to simplify the damages calculation by eliminating the 10% contingency included in the cost estimates prepared in June 1999 and January 2001. When the 10% contingency was excluded from both estimates, the difference between the June 1999 estimate of \$141,581.25 and the January 2001 estimate

of \$155,131.75 is \$13,550.50, which is the amount of damages that Plaintiffs were requesting. (R. at 603–40).

24. Jenkins did not submit his own supplemental affidavits or otherwise challenge the Supplemental Affidavit of Terry Smedley. (R. at 643–44).

25. On January 15, 2002, the trial court issued its Decision granting Plaintiffs’ Motion for Order Awarding Damages, Attorneys’ Fees and Costs. The trial court awarded Plaintiffs actual damages of \$13,550.00 and their attorneys’ fees and costs. The trial court declined to treble the actual damages because it believed that trebling was an “unlawful penalty.” The trial court requested that counsel for Plaintiffs prepare the Findings of Fact, Conclusions of Law and Order. (R. at 643–44).

26. Plaintiffs submitted proposed Findings of Fact, Conclusions of Law and Order to Jenkins for his approval. Jenkins filed an Objection to Plaintiffs’ Proposed Findings and Conclusions on February 22, 2002. (R. at 656–61).

27. On April 8, 2002, the trial court held a hearing on Jenkins’ Objection. (R. at 674). The trial court denied Jenkins’ Objection, signed the Findings of Fact, Conclusions of Law and Order and entered a final Judgment (a) declaring that the Notice of Interest and Recorded Documents were wrongful liens on the Property and void *ab initio*; (b) awarding Plaintiffs damages in the amount of \$13,550.00; (c) awarding Plaintiffs reasonable attorneys’ fees in the amount of \$20,261.75; and (d) awarding Plaintiffs costs in the amount of \$459.06. (R. at 675–84).

28. Jenkins filed his Notice of Appeal on April 22, 2002. (R. at 686–87). Plaintiffs filed their Notice of Cross Appeal on May 10, 2002. (R. at 708–09).

## **SUMMARY OF ARGUMENTS**

The trial court correctly determined that the Notice of Interest and the Recorded Documents were wrongful liens under the Utah Wrongful Lien Act because they were not (a) signed by or authorized pursuant to a document signed by the owner of the Property, (b) expressly authorized by a state or federal statute, or (c) authorized by or contained in an order or judgment of a court of competent jurisdiction in Utah. (R. at 294–99). Consequently, under the Utah Wrongful Lien Act, Plaintiffs were entitled to treble actual damages and their reasonable attorneys’ fees and costs. The trial court properly determined that Plaintiffs’ actual damages were \$13,550.00 and that their reasonable attorneys’ fees and costs were \$20,720.81. (R. at 675–84). The trial court, however, incorrectly refused to treble Plaintiffs’ actual damages as required by the Utah Wrongful Lien Act. (R. at 675–84).

## **ARGUMENT**

### **I. THE TRIAL COURT CORRECTLY DETERMINED THAT THE NOTICE OF INTEREST AND THE RECORDED DOCUMENTS WERE WRONGFUL LIENS UNDER THE UTAH WRONGFUL LIEN ACT.**

#### **A. The Utah Wrongful Lien Act.**

The Utah Wrongful Lien Act is found in Utah Code Ann. §§ 38-9-1 through 38-9-7. The Utah Wrongful Lien Act provides that a “*lien claimant* who records or files or causes a *wrongful lien* to be recorded against real property is liable to a record *holder of interest* for any actual damages proximately caused by the wrongful lien.” Utah Code Ann. § 38-9-4(1) (2002) (emphasis added). A “lien claimant” is defined as “a person claiming an interest in real property who offers a document for recording or filing with

any county recorder in the state asserting a lien or other claim of interest in certain real property.” Id. § 38-9-1(2). A “holder of interest” is defined as “a person who holds or possesses a present, lawful property interest in certain real property . . . and whose name and interest in that real property appears in the county recorder’s records for the county in which the property is located.” Id. § 38-9-1(4). The Act defines a “wrongful lien” as:

any document that purports to create a lien or encumbrance on an owner’s interest in certain real property and at the time it is recorded or filed is not:

- (a) expressly authorized by this chapter or another state or federal statute;
- (b) authorized by or contained in an order or judgment of a court of competent jurisdiction in the state; or
- (c) signed by or authorized pursuant to a document signed by the owner of the real property.

Id. § 38-9-1(6).

If the lien claimant refuses to release the wrongful lien within twenty (20) days of a written request by an interest holder, the lien claimant is liable to such interest holder for \$1,000 or treble damages, whichever is greater, and reasonable attorneys’ fees and costs. Id. § 38-9-4(2). If the lien claimant knows or has reason to know that the document is a wrongful lien, groundless, or contains a material misstatement or false claim, the lien claimant is liable to an interest holder for \$3,000 or treble damages, whichever is greater, and reasonable attorneys’ fees and costs. Id. § 38-9-4(3). A lien is “groundless” when there is “no arguable basis” for the lien or it “is not supported by any credible evidence.” Commercial Inv. Corp. v. Siggard, 936 P.2d 1105, 1111 (Utah Ct.



App. 1997) (This Court defines “groundless” as “a claim of interest in real property [that] has no arguable basis or is not supported by any credible evidence”).

An interest holder is entitled to a hearing on its petition to nullify the lien within ten (10) days of filing the petition. Following the hearing, the trial court must determine whether the document is a wrongful lien. Utah Code Ann. § 38-9-7(5)(a) (2002). If the document is a wrongful lien, the trial court must issue an order declaring the document to be a wrongful lien, releasing the real property from the lien and awarding attorneys’ fees and costs to the interest holder. Id. The amount of such attorneys’ fees and costs is reserved for future determination. Id.

**B. Plaintiffs Had Standing to Challenge the Notice of Interest and the Recorded Documents.**

In his opening brief, Jenkins asserts that the trial court “erred by recognizing Plaintiffs as the owners of [the Property] on September 13, 1999, the date of the recording of the Notice of Interest.” (Jenkins Brief at 1). Not only does Jenkins fail to marshal any evidence to support the trial court’s finding of fact, he fails to cite to any competent evidence in the record to support his argument. In any event, this argument is without merit.<sup>3</sup>

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<sup>3</sup> Throughout his opening brief, Jenkins fails to marshal any evidence in support of the trial court’s findings of fact. Rather than bearing his marshaling burden, Jenkins has “merely presented carefully selected facts” in support of his position, which is “nothing more than an attempt to reargue the case.” See Oneida, 872 P.2d at 1053. By failing to marshal the evidence, Jenkins has put Plaintiffs “in a precarious position” and have compelled them to do his work “at considerable time and expense.” Id. at 1053–54. Such tactics should be rejected and this Court should refuse to consider the merits of his challenges to the trial court’s findings of fact.

As stated above, the Utah Wrongful Lien Act provides that a “lien claimant who records or files or causes a wrongful lien to be recorded against real property is liable to a record *holder of interest* for any actual damages proximately caused by the wrongful lien.” Utah Code Ann. § 38-9-4(1) (2002) (emphasis added). A “holder of interest” is defined as “a person who holds or possesses a present, lawful property interest in certain real property . . . and whose name and interest in that real property appears in the county recorder’s records for the county in which the property is located.” Id. § 38-9-1(4).

During the proceedings below, Jenkins did not dispute that Plaintiffs owned the Countrybrook Parcel when Jenkins recorded the Notice of Interest on September 13, 1999. (R. at 152–97). This alone gave Plaintiffs standing to challenge the Notice of Interest. Moreover, Jenkins did not dispute that Plaintiffs conveyed the Country West Parcel and the Roy Parcel pursuant to Warranty Deeds, which included certain covenants by Plaintiffs, including the covenant “to forever warrant and defend the title” in Country West and the City of Roy. (R. at 167). See Utah Code Ann. § 57-1-12 (2002). When Jenkins recorded the Notice of Interest, Plaintiffs were obligated under the Warranty Deeds to take appropriate action to remove this wrongful lien from the Country West Parcel and the Roy Parcel. The City of Roy and Country West also specifically requested that Plaintiffs take appropriate action to remove the wrongful lien. (R. at 169). The fact that Jenkins released the Notice of Interest from the Country West Parcel did not eliminate the need for a judicial determination as to the validity of the Notice of Interest. As stated in the Affidavit of E. Gregory Higley filed in support of Jenkins’ Motion to Dismiss, Mr. Higley retained an attorney to prepare the Partial Release of the Notice of

Interest, which contemplated that there would be a judicial determination of Jenkins' purported interest in the Property, including the Country West Parcel. (R. at 416–599). The action below did just that.

Finally, the “evidence” submitted by Jenkins with his opening brief does not support his assertion that Plaintiffs were not interest holders under the Utah Wrongful Lien Act. (Jenkins Brief at 9–10). Attachment C is simply a copy of the Notice of Interest. Attachment H is an unauthenticated “MCV Phasing Plan Sub” that appears to have been created or altered by Jenkins. The Preliminary Title Report referred to by Jenkins in his opening brief is not even attached to the Jenkins Brief.<sup>4</sup>

Accordingly, the trial court correctly concluded that Plaintiffs were “holders of interest” under the Utah Wrongful Lien Act and had standing to challenge the Notice of Interest and the Recorded Documents. This Court should affirm the trial court's conclusion.

**C. The Trial Court Correctly Determined that the Notice of Interest Was a Wrongful Lien Under the Utah Wrongful Lien Act.**

The trial court correctly determined that the Notice of Interest was a wrongful lien under the Utah Wrongful Lien Act. (R. at 294–99). The Notice of Interest claims an interest in:

[T]he real and/or personal property which is the subject matter of three civil actions pending in the District Courts of the Second Judicial District, for Weber, Davis and Morgan Counties, state of Utah, which actions are affecting his rights

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<sup>4</sup> Moreover, these exhibits are new “evidence” submitted by Jenkins. They are not part of the record in the trial court.

(real and/or personal), claims (real and/or personal) and/or other interests (real and/or personal) in such property located in Weber County, Utah . . . .

Further, the property as placed in trust by Lynn A. Jenkins I., the successor and President of Residential Mortgage, Inc., a Utah corporation, with Trustee Joseph M. Chambers Esq., was for subdivision development with DeLoy E. Wolfley and Maria Wolfley, and relates to the subject matter of two civil actions pending in the District Court of Lemhi County, state of Idaho, which actions relate to Residential Mortgage's Trust on or about July 20, 1990, by "Special Warranty Deed given to Joseph M. Chambers, as Trustee, in trust for DeLoy S. Wolfley and Maria Wolfley . . . .

The [Idaho] actions arise from the failure of the Barton Family Trust to perform as agreed by Walter E. Barton and his wife, Mary S. Barton of the sale and/or transfer of the real and/or personal property, and by this failure of the Barton Family Trust to complete the transfers and/or exchanges as agreed, affecting the Salmon Idaho property.

(Jenkins Brief, Attachment G).

On its face, the Notice of Interest was a wrongful lien under the Utah Wrongful Lien Act because it was not "signed or authorized pursuant to a document signed by the owner of the property." The Notice of Interest is not signed by Smedley, Countrybrook, Country West or the City of Roy. It is signed by Jenkins only. Moreover, none of the claimed bases for the Notice of Interest included a document signed by Smedley, Countrybrook, Country West or the City of Roy. (R. at 294-99; Jenkins Brief, Attachment G).

Further, the Notice of Interest was not a lien authorized by state or federal statute or authorized by a court order or judgment. (R. at 294-99). Statutory liens include liens for mechanics, hotels, hospitals, storage facilities, landlords, dry cleaners, judgment

creditors, taxing authorities. See Utah Code Ann. §§ 38-1-1 through 38-8-5 (2002). The Notice of Interest was not authorized by any of these statutes. The Notice of Interest was also not a security interest under the UCC because it did not involve goods, personal property or fixtures. (Jenkins Brief, Attachment G).

Finally, the Notice of Interest was not authorized by a court order or judgment. (R. at 294–99). Although the Notice of Interest refers to lawsuits filed in Utah and Idaho, Smedley, Countrybrook, Country West and/or the City of Roy were not parties to those lawsuits. Nor was the Property the subject of those pending actions. Moreover, Jenkins has never obtained a judgment against Smedley, Countrybrook, Country West or the City of Roy. Indeed, the lawsuits referenced in the Notice of Interest were still pending and thus there had been no final judgment, much less a final judgment from a Utah court authorizing the Notice of Interest on the Property. Accordingly, the trial court correctly determined that the Notice of Interest was a wrongful lien as defined by the Utah Wrongful Lien Act. (R. at 294–99).

In his opening brief, however, Jenkins argues that a Special Warranty Deed, which he purported to have signed “as an accommodation,” provided him with an interest in the Property pursuant to Utah Code Ann. § 57-9-4. (Jenkins Brief at 8–10). In order to understand the speciousness of this claimed interest, it is first necessary to provide a brief history of the ownership of the Property. On April 13, 1990, counsel for the parties in litigation entitled Deloy Wolfley v. Edwin M. Higley, Case No. 46796, Second Judicial District Court for Davis County (“Wolfley-Higley Litigation”) executed a Stipulation.

(R. at 54–60). The Stipulation, which was one of the Recorded Documents, provides, in relevant part, as follows:

2. Defendant [Edwin M. Higley] *agrees to transfer to Plaintiff, in full satisfaction of the Judgment (free and clear of all liens and encumbrances) the following property located in Davis County, State of Utah.* Defendant agrees to transfer said property to Joseph M. Chambers, Attorney at Law, in Trust for Deloy and Maria Wolfley free and clear of all liens and encumbrances and to provide evidence of clear title all at his expense in the form of a title insurance policy in the amount of at least \$25,000. [Legal description omitted].

3. *The Plaintiff stipulates and agrees that any amounts received in the sale of the above described property (less costs and fees which may be required to be expended in developing or selling said property) over and above \$12,000 will be applied to the Judgment which they have received and obtained against Dale and Helen Smedley, Civil action No. 2246 in the Second Judicial District Court in and for Morgan County, State of Utah, which Judgment has been docketed in Davis County, State of Utah.*

6. The Defendant shall immediately execute and deliver the Warranty Deed upon execution of this Stipulation and shall thereafter provide evidence of clear title by proper insurance by May 1, 1990.

(Emphasis added.) Jenkins was neither a party to the Wolfley-Higley Litigation nor mentioned in the Stipulation.

The real property described in the Stipulation is actually located in Weber County, not Davis County, and is referred to as the Chambers Property. At the time the parties executed the Stipulation, fee simple title to the Chambers Property was held by First American Equity Trust, a “dba” of Edwin M. Higley. In order to clear title to the Chambers Property, First American Equity Trust conveyed the Chambers Property to

Residential Mortgage Inc. pursuant to a Quit Claim Deed, which in turn conveyed the Chambers Property to Joseph M. Chambers, as Trustee, for the Wolfleys on July 20, 1990 pursuant to a Special Warranty Deed. (See Attachment 1 of Plaintiffs' Addendum). The Special Warranty Deed, which was executed by Jenkins as President of Residential Mortgage, represents that "the officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the grantor at a lawful meeting duly held and attended by a quorum." (Jenkins Brief, Attachment A).

There is nothing in the Stipulation or the Special Warranty Deed that suggests it was signed as an "accommodation" or that the Chambers Property was to be held as "security" for payment of the judgment or that Chambers was not authorized to sell the Chambers Property. Rather, the Stipulation clearly contemplated that the Chambers Property would be sold and the proceeds applied to other judgments obtained by the Wolfleys. Indeed, Jenkins' claim that the Chambers Property was merely "security" rather than a conveyance of fee title is belied by an affidavit he signed in connection with litigation entitled Deloy E. & Maria Wolfley v. Smedley Family Investment Co., Dale T. Smedley & Helen B. Smedley, and C. Demont Judd, Trustee of the Triple S. Trust, Case No. 950000011, Second Judicial District Court for Morgan County ("Wolfley-Smedley Litigation"). (Attachment 1 of Plaintiffs' Addendum). This affidavit is one of the Recorded Documents. In his affidavit, Jenkins testified under oath as follows:

3. In February of 1990, I attended a meeting in the First Security Bank Building, in Ogden, Utah at which Higley,

Harold R. Stephens (Higley's attorney), Wolfley and Joseph Chambers (Wolfley's attorney) were also present.

4. One of the purposes of that meeting was to attempt to reach a negotiated settlement to discharge and satisfy all of the claims that Wolfley had against Higley and Smedley, individually and jointly.

5. During the meeting *Wolfley expressly agreed to accept a conveyance of clear fee title a certain parcel of approximately seven (7) acres of real property located in Roy City, Weber County, sometimes known as Countrybrook Subdivision No. 2 [the Chambers Property], as full and complete satisfaction of all claims Wolfley had against Higley and Smedley, including those claims theretofore reduced to judgement [sic] and those not yet so adjudicated.*

6. The [Chambers] Property was then being held by in the name of First America Equity Trust, a fictitious name used by Higley.

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8. On or about May 2, 1990, Higley, through his dba "First American Equity Trust," conveyed by Quit Claim Deed fee title to the [Chambers] Property to Residential Mortgage Inc., a Utah corporation then owned and managed by me . . .

9. On or about July 20, 1990, in my capacity as president of Residential Mortgage, Inc., and upon instructions by Higley and Smedley, *I executed a Special Warranty Deed as requested by Wolfley, conveying fee title to the [Chambers] Property to "Joseph M. Chambers, as Trustee, in Trust for Deloy Wolfley and Maria Wolfley.*

Thus, fee simple of the Chambers Property was conveyed to Chambers, who in turn conveyed a portion of it to Plaintiffs.<sup>5</sup> The Notice of Interest, however, is not even

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<sup>5</sup> As the trial court properly noted, even if Jenkins' allegations are true, this only means that Edwin E. Higley may have a claim against Chambers or the Wolfleys for breach of the Stipulation. It does not mean that Jenkins may lien the Property or assert



signed by or authorized by a document signed by Chambers, who owned the Property from 1990 to 1997. Under these circumstances, the trial court correctly determined that the Notice of Interest was a wrongful lien under the Utah Wrongful Lien Act. As this Court has explained, “to file a Notice of Interest under § 57-9-4, the person must minimally ‘claim[] to have an interest in the land.’” Russell, 999 P.2d at 1248 ¶ 13. If the person does not have an actual interest in the land, the Notice of Interest “could not be authorized by § 57-9-4 and is therefore not exempted from [the Utah Wrongful Lien Act].” Id. ¶ 14. This Court should affirm the trial court’s determination.

**D. The Trial Court Correctly Determined that the Recorded Documents Were Wrongful Liens Under the Utah Wrongful Lien Act.**

The trial court also correctly determined that the Recorded Documents were wrongful liens under the Utah Wrongful Lien Act.

It was difficult to determine the exact purpose of the Recorded Documents. They did not support Jenkins’ contention that he had an interest in the Property. (R. at 237–44). Indeed, nowhere in the Recorded Documents was Jenkins’ purported interest mentioned. In his own affidavit, Jenkins did not claim an interest in the Property nor did he testify that the Property was being held for his benefit by Chambers. (Attachment 1 of Plaintiffs’ Addendum). Nor did the Recorded Documents support Jenkins’ contention that Dale T. Smedley owed Jenkins money. Jenkins was not even a party to any of the lawsuits referred to in the Recorded Documents. (R. at 237–44). Finally, the Recorded

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claims against Plaintiffs, who were bona fide purchasers for value and who were not parties to the Stipulation.

Documents did not support Jenkins' contention that Dale T. Smedley is the "real" owner of the Property.<sup>6</sup> Instead, the Recorded Documents did nothing more than create additional clouds on Plaintiffs' title to the Property and show Jenkins' willingness to ignore Utah law and Plaintiffs' rights in his efforts to exact money from Plaintiffs. (R. at 237–44).

Thus, the Recorded Documents were clearly wrongful liens under the Utah Wrongful Lien Act. The Recorded Documents were not liens or encumbrances authorized by a state or federal statute. They were not liens or encumbrances authorized by a court order or judgment either. Although some of the Recorded Documents were judgments or referred to judgments, the Recorded Documents did not authorize the recording of any lien or encumbrance on the Property, much less a lien or encumbrance for the benefit of Jenkins. Finally, the Recorded Documents were not liens or encumbrances signed by the owner of the Property. Again, some of the Recorded Documents were signed by the then-owner of the Property. For example, the Stipulation referred to above was signed by Edwin E. Higley at the time he owned the Property. (R. at 54–60). As stated above, the Stipulation did not authorize Jenkins to file a lien or

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<sup>6</sup> In his opening brief, Jenkins asserts that Plaintiffs are really the alter egos of Dale T. Smedley. Dale T. Smedley, who is Smedley's father, was not the owner or the developer of the Property. Dale T. Smedley was not a member of Countrybrook or an officer or director of Country West. Even if Jenkins' allegations were true, however, the Notice of Interest was still a wrongful lien because the Notice of Interest was not signed by Dale T. Smedley or authorized by document signed by Dale T. Smedley. Moreover, Jenkins has failed to provide any evidence that he was authorized by a court order or judgment or state or federal statute to file the Notice of Interest against real property owned by Dale T. Smedley, much less real property owned by his son.

encumbrance on the Property. Nor did the Stipulation or other Recorded Documents convey an interest in the Property to Jenkins. Consequently, the trial court correctly determined that each of the Recorded Documents was a wrongful lien under the Utah Wrongful Lien Act. This Court should affirm the trial court's determination.

**E. The Trial Court Correctly Ruled that Plaintiffs Are Entitled to the \$30,000 in Escrow.**

The trial court also correctly determined that Plaintiffs were entitled to the \$30,000 in escrow because it was placed in escrow as “substitute” property for the Country West Parcel. (R. at 294–99). During the proceedings below, Jenkins argued that the \$30,000 placed in escrow as “compensation to Jenkins as a partial consideration for his Partial Release of his Notice of Interest.” (R. at 246–77). On appeal, Jenkins asserts that he “settled” with the “owner” of the Property and therefore the trial court erred by “releasing Country West’s \$30,000 held in trust without naming Country West as a party.”<sup>7</sup> (Jenkins Brief at 13–14). Jenkins continues to misrepresent the agreement between the parties regarding the \$30,000 in escrow. At the time Jenkins recorded the Notice of Interest, Country West still owed Plaintiffs \$30,000 on the sale of the Country West Parcel from Plaintiffs to Country West. (R. at 168). Plaintiffs, Country West and Jenkins agreed that this \$30,000 would be placed in escrow to serve as substitute property for the Country West Parcel and that Jenkins would release the Notice of Interest from the Country West Parcel. (R. at 168). In other words, Jenkins agreed to transfer his

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<sup>7</sup> In his opening brief, Jenkins continues to argue that Country West should have been named as a party. At no time, however, has Country West attempted to intervene or assert that the trial court improperly released the \$30,000 to Plaintiffs.

claim from the Country West Parcel to the \$30,000 in escrow “pending a resolution of the claims and rights of [Jenkins] in the real property of the said Notice of Interest.” If the \$30,000 was intended to be compensation for the Partial Release, Plaintiffs would have simply paid the \$30,000 directly to Jenkins rather than place it in escrow. Because the trial court correctly determined that Jenkins did not have an interest in any of the Property described in the Notice of Interest, the trial court properly awarded the \$30,000 to Plaintiffs. (R. at 294–99).

**F. The Trial Court’s Decision Did Not Deprive Jenkins of Due Process or His Right to a Jury Trial.**

With no legal citation or factual support, Jenkins argues in his opening brief that the Utah Wrongful Lien Act and the trial court’s disposition of this case is in “direct conflict with” and “fails to recognize a person’s right to due process, equal protection [and] right for a jury trial.” (Jenkins Brief at 7). These arguments are being raised for the first time on appeal and should not be considered by this Court. As this Court has explained, “[a]s a general rule, appellate courts will not consider an issue, including a constitutional argument, raised for the first time on appeal unless the trial court committed plain error or the case involves exceptional circumstances.” Groberg v. Housing Opportunities, Inc., 468 Utah Adv. Rep. 7 ¶ 11 (Utah Ct. App. 2003).

In any event, these arguments are without merit. The trial court did not violate the Utah Constitution by complying with the Utah Wrongful Lien Act. As the Utah Supreme Court has explained, in our judicial system all parties are “entitled to notice that a particular issue is being considered by a court and to an opportunity to present evidence

and argument on that issue before decision.” A “failure to give adequate notice and opportunity to participate can constitute a denial of due process under article I, section 7 of the Utah Constitution.” Plumb v. Utah, 809 P.2d 734, 743 (Utah 1990). In other words, a hearing that is “prefaced by timely notice which adequately informs the parties of the specific issues they must be prepared to meet” satisfies due process. Davies v. Olson, 746 P.2d 264, 267 (Utah Ct. App. 1987).

These standards were clearly met in this case. Jenkins was notified of all four hearings, including the issues that were to be considered by the court at each hearing. Jenkins was given the opportunity to meaningfully participate in each hearing. The fact that Jenkins did not have sufficient evidence to establish a legal basis for recording the Notice of Interest and Recorded Documents does not mean that he was prevented from presenting what sparse “evidence” he did have.

Finally, Jenkins’ argument that the trial court’s disposition of this matter violated his “right” to a jury trial is also without merit. (Jenkins Brief at 13). The Utah Supreme Court rejected such an argument over fifty years ago in Raymond v. Union Pac. R. Co.:

It has been strenuously argued by plaintiff that this decision [dismissing his complaint] has deprived him of his constitutional right to a jury trial. That contention has been urged upon this court in almost every case of nonsuit and directed verdict brought before us. This court is charged with the duty of protecting all of the rights of all litigants. This is especially true of those fundamental rights guaranteed by the State and Federal Constitutions. But the right to have a jury pass upon issues of fact does not include the right to have a cause submitted to the jury in the hope of a verdict where the facts undisputably show that the plaintiff is not entitled to relief.

191 P.2d 137, 141 (Utah 1948). Thus, the trial court's Judgment did not deprive Jenkins of his constitutional rights.

**II. THE TRIAL COURT CORRECTLY DETERMINED THAT JENKINS WAS LIABLE TO PLAINTIFFS FOR DAMAGES AND REASONABLE ATTORNEYS' FEES AND COSTS UNDER THE UTAH WRONGFUL LIEN ACT.**

The trial court correctly determined that Jenkins, by recording the Notice of Interest and Recorded Documents on the Property and refusing to release them within twenty days from the date of Plaintiffs' written request, was liable to Plaintiffs for damages and reasonable attorneys' fees and costs. (R. at 294–99). The Utah Wrongful Lien Act provides:

A lien claimant who records or files or causes a wrongful lien . . . to be recorded or filed in the office of the county recorder against real property is liable to the record interest holder for any actual damages proximately caused by the wrongful lien.

If the person . . . refuses to release or correct the wrongful lien with 20 days from the date of written request from a record interest holder of the real property . . . the person is liable to that record interest holder for \$1,000 or treble damages, whichever is greater, and for reasonable attorneys' fees and costs.

A person is liable to the record owner of real property for \$3,000 or for treble actual damages, whichever is greater, and for reasonable attorney fees and costs, who records or files or causes to be recorded or filed a wrongful lien . . . knowing or having reason to know that the document is (a) a wrongful lien; (b) is groundless; or (c) contains a material misstatement or false claim.

Utah Code Ann. § 38-9-4 (1)(3) (2002).

Under the Utah Wrongful Lien Act, the award of damages and attorneys' fees and costs is mandatory if the trial court finds that the lien or document is a wrongful lien:

Following a hearing on the matter, if the court determines that the document is a wrongful lien, the court *shall* issue an order declaring the wrongful lien void ab initio, releasing the property from the lien, and *awarding costs and attorneys' fees* to the petitioner.

Id. § 38-9-7(5)(a) (emphasis added). As stated above, the trial court correctly found that Jenkins' Notice of Interest and the Recorded Documents were wrongful liens under the Utah Wrongful Lien Act. (R. at 294–99). The fact that Jenkins partially released the Notice of Interest on the Country West Parcel before the hearing does not relieve him of liability for the recording of the Notice of Interest or the Recorded Documents. As this Court has previously held:

The [Utah Wrongful Lien Act's] plain language clearly allows one whose property has been wrongfully encumbered to recover if such encumbrance is not removed within twenty days from the day the owner requests its removal. [internal citations omitted] The statute makes no mention whatsoever that recovery is barred if the encumbrance has been removed, even if 'replaced' by a non-wrongful encumbrance . . . .

Winters v. Schulman, 977 P.2d 1218, 1222 (Utah Ct. App. 1999) (internal citation omitted). Accordingly, the trial court correctly determined that Plaintiffs were entitled to damages and reasonable attorneys' fees and costs.

**A. The Trial Court's Determination that Plaintiffs Incurred \$13,550 in Actual Damages as a Result of the Wrongful Liens Was Not Clearly Erroneous.**

The trial court found that Plaintiffs incurred actual damages in the amount of \$13,550.00 as a result of the wrongful liens recorded by Jenkins. (R. at 675–84). Plaintiffs established, through affidavit testimony, that the costs of developing Phase 10 of the Property increased by \$13,550.00 as a result of the delay of over one year caused

by the wrongful liens. Plaintiffs also established that they did not receive any “benefit” from the delay because they were contractually obligated to sell the lots in Phase 10 for the price negotiated prior to the recording of the Notice of Interest and the Recorded Documents. (R. at 344–59). The trial court held a hearing on the issue of these damages and requested supplemental affidavits to address certain issues raised by Jenkins at the hearing. (R. at 602). Plaintiffs submitted a supplemental affidavit that addressed these issues. (R. at 603–40). Jenkins did not submit an affidavit or otherwise challenge supplemental affidavit of Smedley. After reviewing all of the evidence, the trial court found that Plaintiffs incurred actual damages in the amount of \$13,550.00 as a result of the wrongful liens recorded by Jenkins. (R. at 675–84).

In his opening brief, Jenkins does not submit any competent evidence to challenge this finding, much less fulfill his marshalling burden. Accordingly, this Court should affirm the trial court’s finding that Plaintiffs’ incurred actual damages of \$13,550.00 as a result of the wrongful liens and that they were entitled to recover such damages from Jenkins under § 38-9-4 of the Utah Wrongful Lien Act.

**B. The Trial Court’s Determination that the Attorneys’ Fees and Costs Incurred by Plaintiffs Were Reasonable Was Not Clearly Erroneous.**

The trial court also properly found that the attorneys’ fees and costs incurred by Plaintiffs were reasonable. In support of their request for attorneys’ fees and costs, Plaintiff submitted the Affidavits of Laura S. Scott and T. Richard Davis, which complied in all respects with Rule 4-505 of the Utah Code of Judicial Administration. The Affidavits state the specific “legal basis of the award, the nature of the work performed



by the attorneys, [and] the number of hours spent to prosecute the claim.” R.T. Nielsen Co. v. Cook, 40 P.3d 1119, 1126 ¶ 21 (Utah 2002) (quoting Utah R. Jud. Admin. 4-505(1)). They also affirmatively state that the work performed was reasonably necessary to adequately prosecute the matter, that the billing rates were consistent with the rates customarily charged in Weber County, Utah for similar services, and that numerous meritless pleadings filed by Jenkins increased the amount of attorneys’ fees and costs incurred. See James Constructors, Inc. v. Salt Lake City Corp., 888 P.2d 665, 669 (Utah Ct. App. 1994) (listing factors to be used by trial court in determining reasonable attorneys’ fees). Because the calculation of reasonable attorneys’ fees and costs is in the sound discretion of the trial court, this Court should defer to the trial judge who actually presided over the proceeding and had first-hand familiarity with all of the hearings and meritless pleadings filed by Jenkins. This Court should affirm the trial court’s finding that Plaintiffs’ attorneys’ fees and costs were reasonable. See Cafferty, 46 P.3d at 238 ¶ 26.

### **III. THE TRIAL COURT’S REFUSAL TO TREBLE PLAINTIFFS’ ACTUAL DAMAGES UNDER THE UTAH WRONGFUL LIEN ACT WAS INCORRECT.**

In the proceedings below, the trial court awarded Plaintiffs actual damages in the amount of \$13,550.00. The trial court, however, refused to treble these damages as required by the Utah Wrongful Lien Act because it believed that to do so would be an “unlawful penalty.” (R. at 675–84). The trial court’s refusal to treble Plaintiffs’ actual damages was incorrect as a matter of law because the trebling of damages is mandatory under the Utah Wrongful Lien Act.

As set forth above, the Utah Wrongful Lien Act provides:

A lien claimant who records or files or causes a wrongful lien . . . to be recorded or filed in the office of the county recorder against real property *is liable* to the record interest holder for *any actual damages* proximately caused by the wrongful lien.

If the person . . . refuses to release or correct the wrongful lien with 20 days from the date of written request from a record interest holder of the real property . . . the person *is liable* to that record interest holder for *\$1,000 or treble damages, whichever is greater, and for reasonable attorneys' fees and costs.*

A person is liable to the record owner of real property for \$3,000 or for treble actual damages, whichever is greater, and for reasonable attorney fees and costs, who records or files or causes to be recorded or filed a wrongful lien . . . knowing or having reason to know that the document is (a) a wrongful lien; (b) is groundless; or (c) contains a material misstatement or false claim.

Utah Code Ann. § 38-9-4(1)(3) (2002).

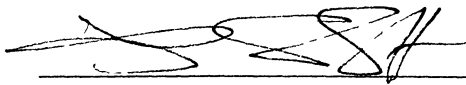
In construing the Utah Wrongful Lien Act, this Court determines its meaning by first looking to the statute's plain language, and giving effect to the plain language unless the language is ambiguous. Lovendahl v. Jordan School District, 2002 UT 130 ¶ 20. This Court must read “the words of a statute literally . . . and give the words their usual and accepted meaning.” Anglin v. Contracting Fabrication Machining, Inc., 37 P.3d 267, 269 ¶ 9 (Utah Ct. App. 2001) (citing Hercules, Inc. v. Utah State Tax Comm'n., 21 P.3d 231, 232 ¶ 9 (Ut. Ct. App. 2000)). In doing so, this Court must “assume that each term was used advisedly by the legislature.” Id. (citing Biddle v. Washington Terrace City, 993 P.2d 875, 879 ¶ 14 (Utah 1999)).

The Utah Wrongful Lien Act is exceedingly plain on its face. By using the phrase “is liable” rather than “may be liable” the Utah Legislature evinced its intent that the award of treble damages is mandatory, not discretionary. Accordingly, the trial court’s refusal to the treble Plaintiffs’ actual damages was incorrect and this Court should reverse the Judgment with respect to the trebling of damages.

### **CONCLUSION**

For the reasons set forth above, this Court should affirm the Judgment except as it relates to the trial court’s refusal to treble Plaintiffs’ actual damages. On that issue, this Court should reverse the Judgment and remand to the trial court with instructions to amend the Judgment to treble the actual damages incurred by Plaintiffs. Finally, Plaintiffs request that the Judgment be augmented to award them their attorneys’ fees and costs incurred on this appeal. See Russell, 999 P.2d at 1248 ¶ 16 (concluding that when a party who received attorneys’ fees below prevails on appeal, “the party is also entitled to fees reasonably incurred on appeal”) (citing Valcarce, supra, 961 P.2d at 319).

DATED this 25<sup>th</sup> day of March, 2003.



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JOHN B. WILSON

LAURA S. SCOTT

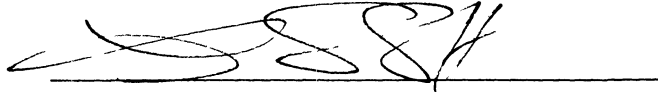
PARSONS BEHLE & LATIMER

Attorneys for Plaintiffs, Appellees and Cross-Appellants

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_ day of March, 2003, I caused to be served, via U.S. mail, postage prepaid, a true and correct copy of the foregoing **BRIEF OF PLAINTIFFS, APPELLEES AND CROSS-APPELLANTS** to:

Lynn A. Jenkins I.  
3 East 2750 South  
Bountiful, UT 84010

A handwritten signature in black ink, appearing to read "Lynn A. Jenkins I.", is written over a horizontal line.

Tab 1

SECOND DISTRICT  
MORGAN COUNTY

98 OCT 21 PM 12:00

CALLISTER NEBEKER & McCULLOUGH  
T. Richard Davis (0836)  
Gateway Tower East, Suite 900  
Salt Lake City, Utah 84133  
Telephone: (801) 530-7300  
Attorneys for Defendants Smedley

IN THE SECOND JUDICIAL DISTRICT COURT OF MORGAN COUNTY

STATE OF UTAH

DELOY E. & MARIA WOLFLEY,  
husband and wife,

Plaintiffs,

vs.

SMEDLEY FAMILY INVESTMENT CO.,  
a Utah Corporation, DALE T.  
SMEDLEY, & HELEN B. SMEDLEY,  
husband and wife, & C. DEMONT  
JUDD, Trustees of the Triple  
S. Trust,

Defendants.

AFFIDAVIT OF LYNN ALLAN  
JENKINS IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT

Civil No. 950000011

STATE OF UTAH                    )  
                                      :    ss.  
COUNTY OF DAVIS                )

COMES NOW, LYNN ALLAN JENKINS, having first been duly sworn  
on oath, and states the following:

1.    I am not a party in the above-entitled action, but have  
been, during all times relevant hereto, a business associate of  
Edwin Higley ("Higley"), and I have personal knowledge of all  
facts set forth herein.

2.    Prior to February 1990, I was aware that Deloy Wolfley  
("Wolfley") had various claims against Dale T. Smedley

("Smedley") and Higley, some of which had been reduced to judgments and were at that time the subject of attempted execution by Wolfley.

3. In February of 1990, I attended a meeting in the First Security Bank Building, in Ogden, Utah at which Higley, Harold R. Stephens (Higley's attorney), Wolfley and Joseph Chambers (Wolfley's attorney) were also in attendance.

4. One of the purposes of that meeting was to attempt to reach a negotiated settlement to discharge and satisfy all of the claims that Wolfley had against Higley and Smedley, individually and jointly.

5. During the meeting Wolfley expressly agreed to accept a conveyance of clear fee title a certain parcel of approximately seven (7) acres of real property located in Roy City, Weber County, sometimes known as Countrybrook Subdivision No.2 (the "Property"), as full and complete satisfaction of all claims Wolfley had against Higley and Smedley, including those claims theretofore reduced to judgement and those not yet so adjudicated.

6. The Property was then being held by in the name of First America Equity Trust, a fictitious name used by Higley.

7. Pursuant to the agreement reached that day, for the next several months I assisted Higley and Smedley in clearing title to the Property.

8. On or about May 2, 1990, Higley, through his dba "First

American Equity Trust," conveyed by Quit Claim Deed fee title to the Property to Residential Mortgage Inc., a Utah corporation then owned and managed by me. Said Quit Claim Deed was recorded in the office of the Weber County Recorder on May 2, 1990, a true and correct copy of which is attached hereto as Exhibit "A."

9. On or about July 20, 1990, in my capacity as president of Residential Mortgage, Inc., and upon instructions by Higley and Smedley, I executed a Special Warranty Deed as requested by Wolfley, conveying fee title to the Property to "Joseph M. Chambers, as Trustee, in Trust for Deloy wolfley and Maria Wolfley." Said Special Warranty Deed was originally recorded in the office of the Weber County Recorder on July 26, 1990 and rerecorded on September 13, 1990, a true and correct copy of which is attached hereto as Exhibit "B."

10. The conveyance described in paragraph 9 above was made conditional upon and for full satisfaction and release of all claims Wolfley held against both Smedley and Higley, and their respective business entities.

11. Since the time of the conveyance, I have believed that all of Wolfley's claims against Higley and Smedley, including Smedley's obligations to Wolfley under the Agreement which is the subject to this lawsuit, have been paid in full and satisfied.

**E# 1718590 BK2084 PG498**



DATED this 21<sup>st</sup> day of October, 1998.

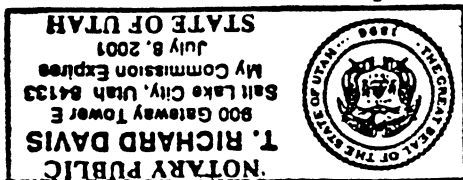
  
LYNN ALLAN JENKINS

STATE OF UTAH

COUNTY OF DAVIS

ss.

The foregoing instrument was acknowledged before me this 21<sup>st</sup> day of October, 1998, by LYNN ALLAN JENKINS.



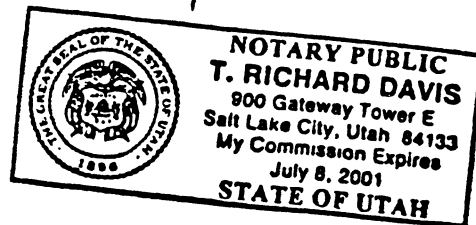
My Commission Expires:

July 8, 2001

  
NOTARY PUBLIC

Residing At:

Salt Lake City, Utah



E: 1718590 BK2084 PG499

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing AFFIDAVIT OF LYNN ALLAN JENKINS IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT was mailed, postage prepaid, and faxing a copy to (435) 753-2091 on this 21<sup>st</sup> day of October, 1998 to the following:

Stephen W. Jewell  
15 South Main, Third Floor  
Logan, UT 84321

  
\_\_\_\_\_

TRD\PLDX\231979-1

E# 1718590 BK2084 PG500

Tab 2

# QUIT CLAIM DEED

EXHIBIT A

FIRST AMERICA EQUITY TRUST, a dbe of EDWIN M. HIGLEY, grantor  
of Clearfield, City, County of Davis, State of Utah, hereby  
QUIT CLAIM to

RESIDENTIAL MORTGAGE INC., a Utah corporation,

of 2 1/2 Lake City, Salt Lake County, Utah, grantee  
Ten and other good and valuable considerations for the sum of  
the following described tract of land in Weber DOLLARS  
State of Utah, to wit: County,

Beginning at a point South 89°1'38" West 668 feet and North  
89°41' East 1228.38 feet from the northwest corner of section 16,  
Township 5 North, Range 2 West, Salt Lake Base and Meridian;  
thence North 89°41' East 271.68 feet, thence South 89°1'38" West  
388.11 feet, thence South 28°04'26" West 47.88 feet, thence South  
19°54'21" East 318.88 feet, thence South 89°38'38" West 686.95  
feet to the Southeast corner of COUNTRYBROOK SUBDIVISION UNIT  
NO. 1; thence North 28°45'18" East 186.32 feet, thence North  
37°55'35" East 83.57 feet, thence North 52°41'58" East 63.56  
feet, thence North 34°29'37" East 163.44 feet, thence North  
43°52'47" East 83.87 feet, thence North 24°48'11" East 125.27  
feet, thence North 80°19'58" West 168 feet to the Northeast corner  
of said COUNTRYBROOK SUBDIVISION UNIT 1, and point of begin-  
ning.

09-072-0020

EB 1107862 BK1379 PG2699  
DOUG CROFTS, WEBER COUNTY RECORDER  
1990 MAY 02 2:08 PM FEE 7.00 DEP PM  
REC FOR RESIDENTIAL MORTGAGE INC.

09-072-0020 =  
ATTENTION VERIFIED:  
MICHAEL J. JONES

WITNESS the hand of said grantor, this 2nd day of May 1990  
DBA: FIRST AMERICA EQUITY TRUST

Signed in the presence of

Edwin M. Higley  
EDWIN M. HIGLEY

STATE OF UTAH,

County of DAVIS

On the 2nd day of May

Edwin M. Higley, dba/

1990

personally appeared before me

FIRST AMERICA EQUITY TRUST

EB 1718590 BK1084 PG501

the signer, Edwin M. Higley is a true and correct person, who duly acknowledged to me that he executed the same.



Michael J. Jones  
Notary Public, residing at